

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2004-000044-001 DT

08/02/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

CAROLINE NEY

v.

RICHARD LOUIS MORENO JR. (001)

ROBERT W DOYLE

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

PHOENIX CITY COURT

Cit. No. #20039012573

Charge: 1) ENGAGE IN CONTRACTING W/O LICENSE

DOB: 12/02/57

DOC: 08/09/02

This Court has jurisdiction of this criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since the time of oral argument on June 7, 2004. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings before the Phoenix City Court, the memoranda and oral arguments submitted by counsel in this case.

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Appellant, Richard Louis Moreno, Jr., was charged by long form complaint in the Phoenix Municipal Court with Contracting Without A Contractors License, a class 1 misdemeanor, in violation of A.R.S. Section 32-1151.¹ Appellant entered a plea of not guilty, and his trial was held on August 26, 2003, before the Honorable Lynda Howell, Judge of the Phoenix City Court. At the conclusion of the trial, Appellant was found guilty of the charge of Contracting Without A License. Immediately following the trial, the court proceeded to sentencing and, over Appellant's objections, ordered restitution of \$19,546.00 be paid to the victim, Terri Lopez.² The trial judge also ordered that Appellant pay a fine of \$1,805.00, but ordered that payment of the fine would be applied to the restitution previously ordered. Appellant filed a timely Notice of Appeal following sentencing.

On appeal, the only issue raised by the Appellant is whether the trial judge erred in computing the restitution amount. Appellant argues that the \$19,546.00 restitution amount was the total amount that Appellant and the victim had contracted-- for all of the work to be performed by Appellant. However, most of the work on the victim's home was completed. Appellant argues that to require him to refund all of the monies paid by the victim would confer "a windfall upon a homeowner (the victim)".³

In State v. Wilkinson (John Porter, Real Party in Interest)⁴ the Arizona Supreme Court resolved the issue of what restitution should be ordered to be paid by a person convicted of contracting without a license. Citing United States v. Fountain⁵ the Arizona Supreme Court ordered restitution be paid to the victims for all monies paid to the unlicensed contractor (Porter):

Indeed, the original conception of restitution, and the form with the most direct link to criminal conduct, is that:

Of forcing the criminal to yield up to his victim the fruits of the crime. The crime is thereby made worthless to the criminal. This form of criminal restitution is sanctioned not only by history but also by its close relationship to the retributive and deterrent purposes of criminal punishment. (citation omitted)

Under Arizona Statutes, these victims are entitled to recover their payments to Porter as restitution.⁶

¹ Appellant was also charged with Advertising to Perform Services or Contracts Without a Required Contractors License, in violation of A.R.S. Section 32-1165. Appellant was found not guilty of this charge.

² R.T. of August 26, 2003, at page 70.

³ Appellant's Opening Memorandum, at page 2.

⁴ 202 Ariz. 27, 39 P.3d 1131 (2002).

⁵ 768 F.2d 790, 800 (7th Cir. 1985).

⁶ State v. Wilkinson, 202 Ariz. at 29, 39 P.3d at 1133.

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In this case, Judge Howell reviewed the Wilkinson decision of the Arizona Supreme Court and discussed it with counsel. She concluded:

I am looking at the various paragraphs and the language in this case, and it appears to this court that the court in Porter (the Wilkinson decision) said that the criminal action of acting as a contractor without a license, and being paid was the crime. And that the restitution statute is to require the defendant to give up the benefit of the illegal conduct, the benefit being the money paid to him.

I understand your argument, and I understand that in a civil context those are the things that one looks at in determining how much, if anything, is defendant -- must defendant pay to a plaintiff. But that's not what we're looking at, and I'm bound by the language in this case.⁷

The trial judge carefully reviewed and considered the appropriate and correct law to apply to the facts of this case. The trial judge correctly concluded that in this case, Terri Lopez' payments to the unlicensed contractor (the Appellant) were the "fruits of the crime." Because the Appellant must not be permitted to profit from his criminal conduct, contracting without a license, the appropriate measure of restitution in this case is all of the monies paid by the victim Lopez to Appellant. That amount is \$19,546.00, as the trial judge correctly determined.

Appellant argues that this court should permit offsets to the total amount of restitution. Appellant argues that it would not be fair if the court did not offset the total amount of restitution by the benefits, or the windfall, conferred upon the victims. However, if the trial court or this court permitted offsets, then the Appellant would be permitted to profit from his criminal conduct. It appears clearly from the Wilkinson decision, that that is not the intent of Arizona's restitution statutes. This Court, therefore, determines that the trial judge (the Honorable Lynda Howell) did not err in ordering restitution of \$19,546.00 be paid by the Appellant to the victim Terri Lopez.

IT IS ORDERED affirming the judgment and sentence of the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings in this case.

⁷ R.T. of August 26, 2003, at page 63.
Docket Code 512

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/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT